APPEAL NO. 043004
FILED JANUARY 12, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 4, 2004. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the 10th quarter, August 6 through November 4, 2004. The appellant (self-insured) appealed, disputing the determination of SIBs entitlement for the 10th quarter. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____, that resulted in an impairment rating of 15% or greater; that the claimant did not commute any portion of the impairment income benefits; and that the dates of the qualifying period for the 10th quarter are April 24 to July 23, 2004.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period for the 10th quarter. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer was persuaded that the claimant had no ability to work, as substantiated by (Dr. E) April 2, 2004, narrative report. We cannot agree. In his April 2, 2004, letter, Dr. E noted that he evaluated the claimant on August 10, 2000, and at that time recommended that the claimant undergo a pain management program and return to work at a sedentary level. Dr. E further noted that since that time, the claimant's condition has worsened. The correspondence of April 2, 2004, specifically stated that Dr. E was "to address return to work issues with [functional capacity evaluation (FCE)]." In the same letter, Dr. E noted that a FCE will be obtained and reviewed.

The claimant underwent a FCE on April 26, 2004. The FCE noted that the claimant demonstrated the ability to perform sedentary work, at less than an 8 hour day. In a letter dated May 6, 2004, Dr. E noted that the FCE did not "alter [his] recommendations per [independent medical examination] evaluation done on April 2, 2004…." However, in that same letter, Dr. E stated "the [claimant] is therefore apparently unable to return to her previous occupation, unless it is restricted, in [his]

opinion, to 4 to 6 hours at one time." In the letter that the hearing officer found sufficient to meet the requirements of a narrative as set out in Rule 130.102(d)(4), Dr. E stated that he would obtain and review a FCE. When Dr. E reviewed the FCE he opined that the claimant is unable to return to her preinjury job unless it is limited to 4 to 6 hours a day.

The Appeals Panel has held that in cases where a total inability to work is asserted and there are other records that on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. However, "[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. In the present case, both the FCE and Dr. E's May 6, 2004, medical report are records which on their face show an ability to work. In the Background Information portion of the decision, the hearing officer noted that "she cannot do any typing work, though, and so a telephone job would not be practical." Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity. Although the hearing officer mentioned the claimant was taking medication for pain control and her pain level increases after its effects wear off, the hearing officer does not provide an explanation of why either the FCE or the May 6, 2004, report from Dr. E were not credible. There is no contention that those records failed to take the claimant's medication and pain level into account.

When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 031052, decided June 19, 2003. Based on the evidence in the record, we cannot agree that the April 2, 2004, letter of Dr. E specifically explains how the compensable injury causes a total inability to work. The hearing officer's determination that the claimant had no ability to work, as substantiated by Dr. E's April 2, 2004, narrative report is not supported by the evidence. Further, the hearing officer failed to articulate a rational basis for rejecting Dr. E's report and the FCE as other records showing that the claimant had some ability to work in the qualifying period for the 10th quarter. In the absence of such an explanation, we believe that his determination that the claimant satisfied the good faith requirements of Rule 130.102(d)(4) is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. We have said that an "other record" need not be a medical report by a doctor. Texas Workers' Compensation Commission Appeal No. 001723, decided September 8, 2000.

Accordingly, the hearing officer's decision that the claimant is entitled to SIBs for the 10th quarter is reversed and a new decision is rendered that the claimant is not entitled to SIBs for the 10th quarter.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

JONATHAN BOW, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge